DECISION AND ORDER

In the matter of the Complaint made by Ms June Kafato on behalf of Summit Halfway House dated May 7, 1983, amended June 7, 1985 alleging discrimination in accomodation on the basis of handicap by Halton Condominium Corporation No. 4 and its servants and agents.

Board of Inquiry: Katherine Tomaszewski

Appearances: For the Ontario Human Rights Commission: Naomi Overend (initially Tom Lederer)

For the ~~Respondent in the beginning~~ complainant: Barry Swadron

(Respondent chose not to be represented after change of Board)

I Background to the current Inquiry

This inquiry has an unusual background. The events which constitute the grounds for a complaint occurred in late 1982 and early 1983, and form the particulars of an Amended Complaint dated June 7, 1985. Professor Ian Hunter was appointed to sit as a Board of Inquiry in this matter. The Hunter Board heard 10 days of evidence. Shortly after the evidence was completed and written arguments were required, the Complainants complained that Exhibit 44 was entered without the opportunity of cross-examination. The Complainant requested that the Hunter Board accept further evidence. Professor Hunter made an interim ruling that no further evidence would be heard. That interim ruling was appealed to the Divisional Court and for a year or more after that it sat suspended, waiting to be heard.

During this time the Complainant brought allegations of bias against the Hunter Board of Inquiry. I quote the words of Mr. Swadron, counsel for the Complainant: (Transcript p. 895, Feb. 12, 1990)

> "...and the Board of Inquiry was asked to reconsider its position and was actually asked to resign. Ultimately, after some correspondence, it was decided by the first Board of Inquiry that it would hear evidence on whether or not it should withdraw from the case....It was decided that that was not the proper forum, decided by the Board of Inquiry. Immediately on the heels of that an application for judicial review was launched to disqualify that Board of Inquiry on the ground of bias. There were examinations of witnesses in aid of the application ordered. Shortly before those examinations were to take place the Board of Inquiry resigned which made the appeal from the interim order unnecessary; it also made the application for judicial review unnecessary and they were both dropped or went the way of the dodo."

Professor Hunter resigned from sitting as a Board of Inquiry in this matter in or about January 1989. I was appointed to act as

a Board of Inquiry by letter dated February 20, 1989. To quote Mr.Swadron again: (Trans. pp. 895-896, Feb. 12, 1990)

> Then...the Respondent brought another application for judicial review to quash the appointment...that...was in fact returnable in February 1989, that was in Hamilton, and Mr. Justice White transferred it to the full Divisional Court in Toronto. I think it was argued in... it was supposed to be in May but there was a judges' conference so it was in June. The three member panel of the Divisional Court dismissed the application and the operation of law saw the second Board of Inquiry continue with this.

On September 22, 1989 I held a meeting with counsel to determine the procedure to be followed with respect to the evidence heard by the Hunter Board. At that meeting, counsel for the Complainant and counsel for the Commission were in attendance. Counsel for the Respondent did not appear, and I was given a letter dated September 12, 1989, addressed to Mr. Thomas R. Lederer (then Counsel for the Commission) by Simpson, Wigle per John Wigle. The relevant portion of this letter indicated that the Respondent did not wish to be represented before me, but that it wished the transcripts of evidence from the Hunter Board to be accepted in their entirety.

In view of these unique circumstances I made the following ruling:

> First: The hearing will proceed in the absence of representation by the Respondent. However, the Respondent is entitled and welcome to be represented at any time during the course of the hearing in this matter. The Respondent shall be kept informed of the proceedings in this matter.
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> Second: It is ruled that this hearing will proceed by having the transcripts of evidence and the exhibits of the Hunter Board of Inquiry entered in their entirety.
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> Third: The hearing will reconvene on December 4, 1989 at which time counsel for all parties will be entitled to make such further submissions as appear to be appropriate to enable the Board to make a final ruling in this matter. This includes recalling witnesses and calling new witnesses. If the Respondent chooses to remain unrepresented at this hearing, Mr. Lederer retains the right to object to questions put to witnesses by Mr. Swadron to ensure that the ordinary rules of evidence and procedure are followed.

The hearing reconvened on February 5 and February 12, 1990, at which point it was adjourned until May 15, 1990. The Respondent was not represented before me on these hearing dates. Ms. Overend replaced Mr. Lederer as counsel for the Commission.

Because of the public importance of the issue of indirect (or

"constructive") discrimination, and because the Respondents chose not to appear before me, I sought legal advice under s. 37(2) of the Code on the following four questions:

> Question 1 : Given that the issue of constructive discrimination appears not to have been pursued before the Hunter Board of Inquiry, is it appropriate to address the issue of constructive discrimination in this case?
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> Question 2 : Must a Board of Inquiry construct legal argument for a party who chooses not to appear or to participate?
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> Question 3 :If the answer to the second question is "no", may a Board of Inquiry construct legal argument for a party who chooses not to appear or to participate?
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> Question 4 : If the answer to the first question is "yes" and the answer to the second or third questions is "yes", what arguments could and should the respondents have made in their defence on the issue of constructive discrimination, had they appeared before me, based on the record?

The advice I received from Professor John Evans, of Osgoode Hall Law School, satisfied me that despite the unusual circumstances in this case it would be appropriate to determine the question of constructive discrimination. Nevertheless, because of the nature of the record before me, I will address only those issues which are necessary to dispose of the matter in this case.

The Respondent was given every opportunity to make submissions with respect to Professor Evans' advice, but did not do so.

Unfortunately, the request for legal advice caused a much longer delay in rendering this decision than had been originally anticipated. This Board regrets the additional delay in what have already been unconscionably protracted proceedings.

II The Facts

The Complainant, Mrs. June Kafato on behalf of Summit Half-Way House Inc. contends that the rights of Summit House, and its residents to equal treatment with respect to occupancy of accommodation have been infringed because of handicap, by the respondent, Halton Condominium Corporation #4. The particulars of the Amended Complaint, dated June 7, 1985 (Exhibit 2) are as follows:

1. On October 19, 1982, Art and Roslyn Thorpe entered into an agreement to lease to Summit Half-Way House Incorporated, a townhouse located at 2295 Mountain Grove Avenue in Burlington, from November 1, 1982 to December 31, 1983. The building was acquired as part of a housing program, the purpose of which is the re-integration of former psychiatric patients into the community.

2. On or about November 17, 1982, Robert Watson, the President of Halton Condominium Corporation No. 4, informed June Kafato, Chairperson for Summit Half-Way House Incorporated, that he had received a complaint from a resident in the housing complex that a half-way house was being established in contravention of the Condominium Corporation's by-laws.

3. As requested by Mr. Watson, a meeting was held on the same day between representatives of Halton Condominium Corporation No. 4 and Summit Half-Way House Incorporated.

4. During the meeting, Mr. Fred Christmas, legal counsel for the Condominium Corporation, informed the Summit House representatives that Section 8 of the Declaration of the Condominium Corporation restricts the use of any unit to a single family residence. However, we believe that certain units are being occupied by individuals who share no family ties.

5. Mr. Christmas served notice to Mrs. Kafato that he would instruct his clients to seek an injunction if Summit Half-Way House Incorporated attempted to occupy the unit in the absence of an amendment to Section 8 of the Declaration. He stated that an application to amend the Declaration must be passed by 75% of the members of the Condominium Corporation.

6. In a letter dated November 18, 1982, Mr. Christmas promised to seek an injunction failing an assurance from Mr. Gregory Brechin, a Summit House Board member, that approval would be sought from the Condominium Corporation. Mr. Christmas restated this position in a letter dated November 26, 1982.

7. On December 1, 1982, a Mr. R. Richards, a board member of Halton Condominium Corporation No. 4, approached Mr. Kjeld Thomasen, Program Co-ordinator of Summit House, at the premises of 2295 Mountain Grove Avenue. Mr. Richards asked Mr. Thomasen if he was aware that he was not supposed to be using the townhouse unit.

8. On December 2, 1982, Mr. Christmas visited the premises at 2295 Mountain Grove Avenue, and posed the same question to Mr. Thomasen.

9. In a letter dated December 6, 1982, Mr. Christmas informed Mr. Brechin that an amendment to the Declaration of the Condominium Corporation would require the approval of 100% of the owners and mortgagees.

10. On December 14, 1982, a meeting was held by the residents of Halton Condominium Corporation No. 4. The Condominium Directors pledged legal action to remove Summit Half-Way

House from the premises at 2295 Mountain Grove Avenue.

11. At that time, the tenancy of Summit Half-Way House was rejected by the majority of Corporation members in attendance because the House did not constitute a single family. The decision of the members was also based on the expectation that the psychiatric history of prospective residents would generate a decline in property values.

12. At a February 3, 1983 general meeting of the Condominium Corporation, a Mr. Douglas Tuck, Executive Member and Treasurer for the Condominium Corporation, expressed concern about the Half-Way House residents using the pool facility. Mr. Tuck added that the retention of Summit Half-Way House would create a precedent for the location of other half-way houses in the complex.

13. [Withdrawn by consent March (or May) 4, 1987.]

14. We, therefore believe that the right of our residents to equal treatment with respect to the occupancy of accommodation without discrimination has been infringed because of handicap, in contravention of Sections 2(1) and 8 of the Human Rights Code, 1981, Chapter 53.

15. We further believe that our right to equal treatment with respect to occupancy of accommodation without discrimination has been infringed because of our association and dealings with persons who are handicapped, in contravention of Sections 11 and 8 of the Human Rights Code, 1981, Chapter 53.

16. We finally believe the Declaration of the Halton Condominium Corporation which restrict occupancy to single families impose a requirement which may result in the exclusion of handicapped persons from occupancy of accommodation in contravention of Sections 10 and 8 of the Human Rights Code, 1981, Chapter 53.

I accept that paragraphs 1 to 11 , with the exception of the second sentence of paragraph 11, contain a substantially accurate summary of some of the facts in this matter.

The Respondent commenced an action against (inter alia) Summit Half Way House. The writ, dated December 21, 1982, (Exhibit 2A) set out the (plaintiff) Respondent's claim as follows:

for:

(a) a declaration that the restrictions and stipulations contained in paragraph 8(a) (i) of the Declaration under the Condominium Act registered on title to the lands and premises known as Halton Condominium Plan No. 4 are valid

and binding on the Defendants herein;

(b) a declaration that the use of Unit #48, in Halton Condominium Plan No. 4, municipally known as 2295 Mountain Grove Avenue, Burlington by the Defendants herein as a group home or half way house is in contravention of said paragraph 8 (a) (i) of the said Declaration;

(c) a permanent injunction restraining the Defendants, their agents, servants, assigns, successors, guests, and invitees from using the said unit #48, Halton Condominium Plan No. 4, municipally known as 2295 mountain Grove Avenue, Burlington as a group home or half way house;

(d) a temporary or interlocutory injunction restraining the Defendants, their agents, servants, assigns, successors, guests, and invitees from using the said unit #48, Halton Condominium Plan No. 4, municipally known as 2295 Mountain Grove Avenue, Burlington as a group home or half way house, pending the disposition of the within action;

(e) costs of this action on a solicitor-client basis.

This action was dismissed because the respondents had failed to give notice to all the mortgagees of the condominiums located in Halton Condominium Plan No. 4, of the action. Substantially the same action was commenced against (inter alia) Summit Half Way House in February, 1983. The decision to commence the second action was approved by the members of the Respondent at a meeting on February 3, 1983. The vote was taken by a secret ballot.

At some point, the parties agreed to pursue the procedures set out in the Human Rights Code in an attempt to resolve their dispute regarding paragraph 8 (a) (i) of the Declaration and the occupancy of 2295 Mountain Grove Avenue by Summit House. During this time, the Respondent did not proceed with their Supreme Court application for a declaration and injunction. The Supreme Court application was eventually discontinued, during the course of the hearings held by the Hunter Board of Inquiry.

Summit Half-Way House has enjoyed quiet and peaceful occupancy of 2295 Mountain Grove Avenue from November, 1982 until the present. It appears from the record that the Respondent did nothing to oppose the occupancy of Summit House, other than to seek a declaration from the Supreme Court, which would have clarified the rights of both parties with respect to the Declaration under the Condominium Act and the occupancy of Summit House. The request for an injunction was part of the application for the declaration.

Counsel for the Complainant argued that the Respondent engaged in direct discrimination against Summit Half-Way House (and its residents) by seeking a declaration and injunction to prevent

Summit Half-Way House from occupying 2295 Mountain Grove Avenue. Counsel for the Human Rights Commission argued that paragraph 8(a) (i) and (ii) of the Declaration, insofar as they apply to prevent Summit Half-Way House from occupying 295 Mountain Grove Avenue, constitute constructive or indirect discrimination. I will deal with each of these arguments in turn.

III Direct Discrimination

Mr. Swadron argued for the Complainants that the Respondent discriminated against the Complainant by seeking a declaration and injunction in the Supreme Court. The effect of the injunction, had it been granted, would have been to prevent Summit from occupying the townhouse condominium. Mr. Swadron relied in particular on sections 2(1), 8 and 9(b) (ii) of the Human Rights Code. I agree with Ms. Overend that the applicable interpretation of "handicap" in this case is s. 9 (b) (iv) "a mental disorder".

Mr. Swadron lead evidence to show that several persons occupying units within the condominium complex were in breach of various portions of the Declaration. This included evidence of businesses being run out of several units (plumbing, draperies, daycare centre(s)), and of unrelated persons living together who would not constitute a single family (eg. a group of stewardesses and a group of nuns). Evidence was also lead to show that the Respondent had not taken any steps to enforce the Declaration against any of these persons, and in particular that no court action had ever been taken to enforce the Declaration against anyone up to the time when legal action had been taken against Summit.

Mr. Swadron invited me to draw from this the conclusion that because no action had ever been taken to enforce the Declaration, the Respondent (through its Board of Directors) was not really very concerned about the enforcement of its Declaration, and that it sought to enforce it against the Complainant only because the Respondent did not wish to have ex-psychiatric patients living in the condominium complex. In other words, Mr. Swadron argued that the Respondent was motivated by discrimination to enforce the Declaration. The Complainant argued that the initiation of the first court action and the second one were part of a continuing pattern of discriminatory behaviour.

As evidence of this discriminatory intent, the Complainant pointed to the initial complaint received by Mr. Robert Watson (President of the Respondent at the relevant time) from a resident in the housing complex that a half-way house was being established. (Amended Complaint para. 2, Ex. 2) There was some evidence that this complaint was made by a police constable, who based his complainant on his professional experience with other half-way houses.

The Complainant also points to the comments made by a Mr. Douglas Tuck, at the meeting of the members of the Respondent at

which the decision was made to pursue the Supreme Court action for a declaration and injunction. (Ex.2 para. 12) There was conflicting evidence as to what exactly Mr. Tuck said at this meeting, but it is clear from the transcript that what he said was "inflammatory" and discriminatory.

Counsel for the Complainant spent a great deal of time in an effort to establish this evidence as "fact". In my opinion, even if this evidence is accepted as "fact", the Complainant has failed to make out the case of discrimination on the balance of probabilities. Based on this evidence alone, I am not persuaded that the Respondent corporation was motivated (in whole or in part) by an intent to discriminate when it decided to pursue legal action against the Complainant.

Apart from the opinions of Mr. Tuck, there is no clear evidence as to what motivated the members of the Respondent to vote in favour of pursuing legal action, particularly since some of the members expressed clear support for not pursuing legal action, and since the vote was done by secret ballot.

The Respondent is a corporation, and by analogy to the law of corporations, the opinions of individual members of the corporation, in a general meeting, do not constitute the "directing mind " of the corporation, unless for example, the member (or shareholder) controls the majority of the votes and thus controls the management of the corporation. In the case of the Respondent, every member of the corporation has only one vote, and thus cannot be said to be 'controlling'.

Counsel for the Commission submitted that because the complaints were motivated by discrimination, and Robert Watson (President of the Respondent at the relevant time) acted on those complaints, the actions of the Respondent were discriminatory. In my opinion, to establish that the Respondent corporation "adopted" the alleged discriminatory intent of some of its members, more evidence is needed.

That evidence can be found in Exhibit 4A , an affidavit of Robert Watson, dated December 20, 1982, and sworn in support of the initial Supreme Court action. Included as support for the application for a declaration and injunction is paragraph 16:

> Since the Defendants made known their intention to use the said unit as a half way house for people with histories of mental illness, I and other directors of the Condominium have received many representations [sic] from the residents in the various units objecting to such use. Moreover, many residents with young children have also expressed their anxieties regarding the safety and wellbeing of their children while in such close proximity to residents of a half-way house.

Although counsel did not bring this paragraph to my attention, and

did not address any argument to this point, in my opinion this paragraph indicates that at least part of the motivation of the Respondent , through its Directors, in seeking the declaration and injunction was to address the (discriminatory) concerns of "the residents in various units objecting to such use.".

In my opinion, the Respondent was motivated, at least in part, by a discriminatory intent when it sought the declaration and injunction in the Supreme Court. Does this mean that the Respondent has contravened sections 2(1), and 8 of the Human Rights Code?

In my opinion the answer to this question is "no". In a country where the Constitution recognizes the "rule of law" as its foundation (see the preamble to the Canadian Charter of Rights and Freedoms), it is essential that every person be free to go to court to have their legal rights determined. The Respondent was entitled to seek an answer from the court as to whether or not it could lawfully enforce the Declaration against the Complainant. The Respondent's recourse to the court was not part of any pattern of harassment aimed at preventing Summit House from occupying the condominium unit. The Respondent did nothing to disturb the peaceful occupation by Summit House of the unit.

Both the Complainant and Summit House are very interested in obtaining an answer to the question of whether or not the Declaration can lawfully be enforced against Summit House. Had the matter proceeded to court, that question would have been answered. There is no reason to think that the Complainant or Summit House would have been prejudiced in any way by having that question decided in court.

I therefore find that in the circumstances of this case, the Respondent did not contravene any provisions of the Human Rights Code when it sought the declaration and injunction against Summit House.

IV Constructive Discrimination

Counsel for the Commission, relying on s. 10 of the Code argued that paragraphs 8(a)(i) and (ii) of the Declaration had an exclusionary and adverse impact on groups identified by a prohibited ground of discrimination, namely handicap.

Summit House is a corporation and is itself not a "member" of a group of persons who are identified by a prohibited ground of discrimination. However, Summit House is clearly identified with persons identified by a prohibited ground of discrimination. Section 11 of the Code states that:

> A right under Part 1 is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

It is clear from the prohibited grounds of discrimination listed in s. 2 (1) that this section is intended primarily to protect individuals and not corporations. However, this protection also extends to corporations when, as in this case, the corporation exists solely for the benefit of persons who are identified by a prohibited ground of discrimination. Given the transitory nature of the residents of Summit House, and given the nature of their handicap, it is unlikely that any of these persons would or could bring a complaint of this type under the Human Rights Code. It is therefore appropriate to read sections 2(1), 8,9, 10, and 11 in combination to permit Summit House to complain that the enforcement of paragraphs 8 (a)(i) and (ii) of the Declaration against it constitutes an infringement of s. 10 of the Code.

Paragraphs 8(a)(i) and (ii) of the Declaration provide:

> 8. (a) Provisions Respecting the Units: The occupation and use of the units shall be in accordance with the following restrictions and stipulations:
>
> > (i) Each unit shall be occupied only as a one-family residence by the owner of the unit(s), his family and guests. For the purpose of these restrictions, "one-family residence" means a building occupied or intended to be occupied as a residence by one family alone and containing one kitchen, provided that no roomers or boarders are allowed. A "boarder" for the purpose of these restrictions is a person to whom room and board are regularly supplied for consideration and a "roomer" is a person to whom room is regularly supplied for consideration;
> >
> > (ii) Notwithstanding any definition or provision in any by-laws of the Corporation of the Town of Burlington, no unit shall be used in whole or in part for any commercial or professional purpose involving the attendance of the public at such unit. Without limiting the generality of the foregoing, no unit or part thereof shall be used as an office by a doctor, dentist, chiropractor, drugless practitioner, or other professional person;

Evidence was given by Mr. Raymond Wilson, a man with over 11 years of experience in condominium management, and the current property manager of the Respondent, that the Declaration of the Respondent is "almost identical to every corporation in the province of Ontario". (Transcript pp. 760-764) Given the increase in the popularity of condominiums in Ontario in the last 10 years, (Exhibit 5A) the question of whether or not provisions such as those contained in paragraph 8 of the Respondent's Declaration can be enforced against Summit House is of obvious importance.

Mr. Howard Richardson, an expert in mental health matters testified to the importance of supportive housing, such as Summit House in the current governmental policy of returning ex-

psychiatric patients to their communities. He also testified that Summit House falls into the highest level of supportive housing, requiring 24 hour supervision. It appears from the evidence that any group home which requires significant attendance of supervisory staff would be viewed as incompatible with paragraphs 8(a)(i) and (ii) of the Declaration.

In these circumstances, would the enforcement of the Declaration to prohibit group homes from occupying condominium units have an adverse impact on persons handicapped by reason of a mental disorder, where such persons require supportive housing? Based on the evidence before me, the answer to that question is clearly "yes".

Does the Respondent have a defence? The burden of proving a defence falls on the Respondent. (See Ontario Human Rights Commission and O'Malley v. Simpson - Sears 7 C.H.R.R. D/3102 (S.C.C.) para. 24781; 24782). Regardless of how s. 10 is to interpreted, I agree with counsel for the Commission that "it would appear that the Respondents have simply not put their mind to this issue at all as there was no evidence offered, impressionistic or otherwise, to support the validity of paragraphs 8(a)(i) and (ii) of the Declaration. Consequently, they have failed to discharge their burden of proof". (Trans. p.965). As a result, there is no record before me on the issue of a defence under s. 10 of the Code, although I am inclined to agree with Ms. Overend that it would be very difficult for the Respondents to establish the defence on the evidence that has been submitted.

I conclude therefore, on the evidence before me, that enforcement of paragraphs 8(a)(i) and (ii) of the Declaration against Summit House is a violation of the Complainant's s. 10 right to equal treatment with respect to occupancy of accommodation.

V. Order

Neither the Complainant nor the Commission have requested that damages be awarded in this case.

I hereby make an order that paragraphs 8(a)(i) and (ii) of the Declaration of the Respondent be read down to permit group homes for ex-psychiatric patients to occupy condominium units.

Kathy Tomaszewski

Katherine Tomaszewski
Chair, Board of Inquiry

Dated: February 27, 1991